Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband	)	
Deployment by Removing Barriers to	)	WC Docket No. 17-84
Infrastructure Investment	)	
	)	

WRITTEN EX PARTE OF PUBLIC KNOWLEDGE, COMMUNICATIONS WORKERS OF AMERICA, INSTITUTE FOR LOCAL SELF RELIANCE, NATIONAL DIGITAL INCLUSION ALLIANCE, NATIONAL HISPANIC MEDIA COALITION, THE UTILITY REFORM NETWORK

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I. INTRODUCTION

Public Knowledge, Communications Workers of America, Institute for Local Self Reliance, National Digital Inclusion Alliance, National Hispanic Media Coalition, Kentucky Resources Council, and The Utility Reform Network (collectively, "PK, *et al.*") submit this written *Ex Parte* in response to the Federal Communications Commission's ("Commission" or "FCC") combined Draft Order and Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, collectively entitled *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*.[1]

The Technology Transitions proceeding and process is an imperative piece of closing the digital divide, bringing modern communications infrastructure to all Americans, and holding telecommunications providers accountable for the quality of service they provide to the public. The continued operation of the copper telephone network remains critical to public safety. Millions of small businesses continue to rely on traditional TDM services. The Draft Order threatens to undermine the operation of our critical communications infrastructure, in violation of both the Communications Act and the Administrative Procedure Act ("APA").

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[1] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, DRAFT Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, FCC-CIRC1711-04, (Oct. 26, 2017) *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-347451A1.pdf ("Draft Order"); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017) ("2017 NPRM").

As discussed below, the Draft Order mischaracterizes the filings of Public Knowledge and others, and thus fails to address the arguments raised by commenters as required under the APA. In a last effort to persuade the Commission, PK, *et al.* review the legal arguments below. Specifically, contrary to the conclusion of the Draft Order, the plain language of the Communications Act makes it clear that the word "service" as used in section 214 means the telecommunications service for which a carrier must apply for a certificate, not the tariff associated with that service as the Commission suggests. Because the sentence that authorizes the Commission to condition or deny a certificate of public convenience and necessity for discontinuance is ***the exact same sentence*** that governs the Commission's license transfer authority and initial grant authority,[2] the rules of statutory construction and common English grammar require the Commission to apply the authority identically. The Commission points to no evidence to support its conclusion that Congress intended the exact same sentence to mean one thing for a grant of a certificate to offer "service," the same thing for a certificate to transfer "service," but something entirely different for a certificate to discontinue "service."

Additionally, the record contains insufficient evidence to support the Commission's conclusions with regard to either reducing the notice period or modifying the standards and safeguards adopted in the *2016 Second Report and Order*.[3] Parties have made no effort to quantify the supposed burden imposed by the previous rules, or provided any evidence to support the argument that but for these rules they would be deploying broadband -- the ostensible object

[2] *See* 47 U.S.C. §214(c).

[3] *Technology Transitions et al*, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 FCC Rcd 8283 (2016).("*2016 Second Report and Order*").

of the rule changes. Indeed, it is difficult to see the rational connection between relaxing the rules to allow providers to offer poorer quality basic voice service or abandon the service area entirely-- which is what the Draft Order does-- and investing even more money in deploying broadband networks that offer superior service.

Finally, even if section 214 could be interpreted in the manner proposed in the Draft Order, the Commission may not repeal the rules adopted in the *2016 Second Report and Order* without actually seeking notice and comment on repeal of the rules.[4] This is particularly true here, where the 2017 NPRM went out of its way to obscure the true nature of the proposal by characterizing the functional test portion as a "Request for Comment" -- a term with no legal definition in the Commission's rules and which the Commission has not previously used to indicate a proposal for rulemaking. Nothing in the proposal suggested that the Commission would proceed from a modest "Request for Comment" to the full repeal of the standards and safeguards meticulously negotiated over years of Commission proceedings. Nor can it be considered a logical outgrowth of the Commission's determination to narrow the definition of "service" with regard to discontinuances. Given that section 214(c) expressly permits the Commission to condition grant of a certificate of discontinuance of service (however defined) as "such terms and conditions as in its judgment the public convenience and necessity may

[4] In keeping with its general pattern of obfuscation in this proceeding, the Draft Order does not explicitly state that it is repealing the standards and obligation to support the services and equipment identified in the *2016 Second Report and Order* -- it merely implies it by saying that it is eliminating the "functional test." If the final Order as adopted does not intend to alter the obligations to support the identified services until 2025, and to require a showing that the substitute service meets the standards described in the *2016 Second Report and Order* despite the purporting to eliminate the functional test, the final Order should make this abundantly clear.

require,"[5] a reasonable person would not conclude that narrowing the definition would automatically result in the complete discarding of the standards and safeguards adopted on the basis of a massive multi-year rulemaking. To the contrary, the 2017 NPRM gave every impression that the Commission would proceed (as required) by a formal Notice of Proposed Rulemaking, setting forth precisely what rules it planned to modify or repeal and what rules it would remain consistent with its authority under sections 1, 4(i), 201(b), 214(c) of the Communications Act or other relevant sources of authority to protect consumers and the public interest.

II. THE DRAFT ORDER DOES NOT ADEQUATELY ADDRESS CONCERNS ABOUT ITS REINTERPRETATION OF THE DEFINITION OF SERVICE UNDER SECTION 214.

A. The Commission Did Not Adequately Address or Analyze Opposing Arguments Made By Commenters in the Record.

As stated in Public Knowledge's initial comments and by other commenters in the record, we strongly object to the Commission's efforts to revisit and abandon critical consumer protections by reinterpreting section 214(a).[6] The Commission has customarily interpreted the

[5] 47 U.S.C. §214(c).
[6] Comments of Public Knowledge, WC Docket No. 17-84, at 1 (June 15, 2017) ("Public Knowledge Comments"); Comments of Communications Workers of AMerica, WC Docket No. 17-84, at 9 (June 15, 2017) ("CWA notes that the plain language of section 214(a) focuses on "service to a community.") ("CWA Comments").

term "service" to extend beyond the four corners of a tariff, including in previous discontinuance proceedings. Maintaining the functional test allows for a broad interpretation of what constitutes a "service," and better mirrors the statutory language of section 214(a).[7] The Commission has also "consistently interpreted the term "service" to mean the subject of the certificate of public convenience and necessity, not merely those services defined by the tariff."[8] In its Draft Order, the Commission completely disregards the arguments made in the record by Public Knowledge and other commenters as to why Commission precedent and statutory interpretation direct the Commission to continue interpreting service beyond the four corners of a tariff.[9]

First, the Draft Order dismisses Public Knowledge's highlight of the plain language of the statute and mischaracterizes the argument as a whole.[10] The Draft Order focuses on the plain language of each section of the statute,[11] while Public Knowledge emphasizes that section 214(a) and 214(c) must be read together and interpreted as a whole.[12] The Draft Order goes on to analyze the nuances of the statute instead of addressing Public Knowledge's actual argument: a reading of section 214 as a whole "indicates the Commission must tie service to the needs of the

[7] CWA Comments at 30-31; *see also* Reply Comments of Public Knowledge, WC Docket No. 17-84, at 8 (July 17, 2017).
[8] Public Knowledge Comments at 10.
[9] Draft Order at para 135, 139.
[10] *Id*. at para. 135.
[11] *Id*.
[12] Public Knowledge Reply Comments at 8.

community."[13] The Commission cannot simply dismiss legal reasoning in opposition to its agenda without an explanation, especially by merely stating that the reasoning is in opposition.[14]

Later in the Draft Order, the Commission again dismisses opposing arguments without proper explanation by claiming Commission precedent cited by commenters in the record, including Public Knowledge, are "irrelevant to the discussion at hand."[15] To clarify, the argument the Draft Order attempts to counter is simply not the argument Public Knowledge actually made. Rather, the accurate argument which Public Knowledge asserted in the record is that the Commission exercises its section 214 "authority in a variety of contexts ranging from technology transitions to new deployment and competitive entry to review of mergers and acquisitions."[16] Even so, the Draft Order dismisses the notion that its interpretation of service in other proceedings -- under the same statute -- are persuasive to the current interpretation change. Instead, the Draft Order reasons that its own precedent "is not dispositive"[17] and focuses on detariffed services, without explaining why it contends so.

To restate the argument clearly and unambiguously, section 214(c) states that when the Commission issues a "certificate" required by section 214(a):

> The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and

[13] *Id*.
[14] Draft Order at para. 135 (vaguely asserting the opposing "argument thus relies on a mistaken reading of the plain language of the statute").
[15] *Id*. at para. 139.
[16] Public Knowledge Comments at 10.
[17] Draft Order at para. 139.

> conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of **such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service** covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.[18]

This is a list of functions combined in a single sentence that indicate what the certificate required to be issued under section 214(a) does, and how it works. This list is comprehensive and makes no distinction between the terms or functions. That is why the Commission's interpretation of its authority with regard to "acquisitions" (aka "mergers") is relevant to its authority for "discontinuances." Because, as quoted above, the language authorizing both the review and grant of the "application" described in section 214(a) is from ***the exact same sentence.*** There is absolutely no rational basis, absent some clear signal from Congress, to explain why all items in this list are treated identically ***except*** "discontinuance." Unsurprisingly, perhaps the Draft Order does not even try to address this actual argument, preferring to waive it aside by declaring that -- despite the identical treatment in the statutory language by Congress -- its reading of this language in the context of "acquisitions" is "not dispositive."

The Draft Order now reasons that the legislative history of section 214(a) implies that Congress sought to find a balance between "protecting Americans' continued access to the nation's communications networks [and] … preserving carrers' ability to upgrade their services

[18] 47 U.S.C. §214(c) (emphasis added).

without the interruption of federal micromanaging."[19] Idle speculation cannot contradict the plain language of the statute. Section 214, above all else, mandates the Commission to take actions that protect consumers from harms associated with termination or decreases in their communications services by finding that the discontinuance serves the public convenience and necessity, or either attaching such conditions as are necessary or denying the application. The ambiguous statements of two congressmen[20] cannot alter the plain language of the statute, or generate statutory ambiguity where it does not exist. But, more to the point, if the Commission's analysis of the statutory language is correct, it must apply with equal force to certificates granted to approve an "acquisition." While the Commission readily acknowledges that it has treated the word "service" with regard to acquisitions quite differently than it proposes to treat "service" with regard to discontinuances and impairments, it does not provide an explanation as to *why* the statute should be interpreted in such an unnatural manner.

Further, the Draft Order's assertion that contract law principles require the definition of "service" to be limited to a tariff[21] is unconvincing. While contract law does support the notion that "the terms of the contract control, regardless of the parties' subjective intentions as shown by extrinsic evidence,"[22] contract law also requires courts to remedy situations of unfair bargaining power, as is the case between carriers and consumers.[23] Therefore, when taken as a

[19] Draft Order at para. 132.
[20] *Id*. at para. 132 (citing 89 Cong. Rec. 786 (1943) (statement of Rep. Brown); 89 Cong. Rec. 777 (statement of Rep. Wadsworth)).
[21] Draft Order at para. 142.
[22] *Id*. (quoting *Tanadgusix Corp v. Huber*, 404 F.3d 1201, 1205 (9th Cir. 2005)).
[23] *See* Consumers Union Comments, GN Docket No. 14-28 at 7 (July 15, 2014).

whole body of law, contract principles actually favor a definition of service that goes beyond a carrier's tariff.

B. The Canons of Construction Demand the Commission Continue to Interpret Service Beyond the Corners of a Tariff as The Statute as a Whole Directs.

The Draft Order argues that, "although the Act does not define 'service,' traditional tools of statutory interpretation provide guidance as to its meaning."[24] However, the Draft Order does not specifically cite to any traditional tools. When interpreted through the lens of the Canons of Construction,[25] "service" should be interpreted to go beyond the limitations of a tariff based on a reading for the full statute and like statutes.

Particularly, the Canon of *Noscitar a Sociis* holds that "the meaning of an unclear or ambiguous word should be determined by considering the words with which it is associated in context.[26] A term which appears several times in one statute is also construed to mean the same thing each time.[27] Further, courts have found "that similar language contained within the same

[24] Draft Order at para. 130.
[25] *Statutory Interpretation: General Principles and Recent Trends*, Congressional Research Service (Sept. 24, 2014) *available at* https://www.everycrsreport.com/files/20140924_97-589_3222be21f7f00c8569c461b506639be98c482e2c.pdf ("Statutory Interpretation").
[26] Definition of Noscitar a Sociis, FindLaw.com, *available at* http://dictionary.findlaw.com/definition/noscitur-a-sociis.html (last visited Nov. 6, 2017).
[27] *See* Statutory Interpretation at 16; *see also Ratzlaf v. United States,* 510 U.S. 135, 143 (1994)*; Gustafson v. Alloyd Co.,* 513 U.S. 561, 570 (1995); *Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co.,* 505 U.S. 214, 225 (1992).

section of a statute be accorded a consistent meaning."[28] Thus, if the Commission interprets its section 214 authority with regard to competitive entry, review of mergers and acquisitions[29] and discontinuance obligations on interconnected Voice over IP (VoIP) services one way,[30] then it must do so in the copper retirement context at hand. Additionally, even as the Draft Order has again mischaracterized Public Knowledge's argument,[31] it still is obligated to interpret the term and statute consistently; if Congress intended a term to be defined a certain way in the beginning of an Act, that definition inherently follows the term throughout the Act.

Here, Congress has consistently used the term service to mean activities more broad than that of a tariff, beginning with the definition of the term in section 153.[32] The Draft Order has not offered any legislative history specifically as to why Congress would have intended to define service differently in section 214 than in the rest of the Act. Instead, the Draft Order points to scraps of legislative history that it argues suggest, absent any context, that Congress intended an entirely different meaning for "service" with regard to discontinuance, but not with regard to grant of licenses, transfer of licenses, or any other provision of the Communications Act. To use

[28] Statutory Interpretation at 16; *see also* National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 501(1998).
[29] Public Knowledge Comments at 10.
[30] Public Knowledge Reply Comments at 8.
[31] Draft Order at para. 139 ("Yet, in support of this assertion, Public Knowledge cites only the fact that the agency continues to maintain and exercise authority over mergers and acquisitions that implicate detariffed services.").
[32] 47 U.S.C. 153 (53) ("The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used").

a now well worn axiom, "Congress does not hide elephants in mouseholes."[33] Certainly if Congress had intended the word service to have such a uniquely narrow meaning in the context of discontinuance, it would have said so.

C. As an Independent Agency, the Federal Communications Commission Must Consider Consistency, Logic, and Reason When Creating or Changing Policies Instead of Political Pressure.

The purpose of an Independent Agency is to insulate a small branch of government from the political pressures typically presented to policymakers. The FCC, like other Independent Agencies, has a bipartisan Commission: a balanced platform to produce fair, significant communications policies. Historically, the majority party of the Commission switches with the political affiliation of the sitting President and allows for different policy priorities and interpretation. However, "it does not permit them to make policy choices for purely political reasons nor to rest them primarily upon unexplained policy preferences."[34] Further, it is the Agency's "comparative freedom from ballot-box control [that] make it all the more important that courts review its decision making to assure compliance with applicable provision of the law -- including law requiring that major policy decisions be based upon articulable reasons."[35] The

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[33] "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions— it does not, one might say, hide elephants in mouseholes." *See MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U. S. 218, 231 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–160 (2000).
[34] *Fox* at 547 (Breyer, J., dissenting).
[35] *Id*.

APA implores Agencies to rely on reason and "helps assure agency decision making based upon more than the personal preferences of the decision makers."[36]

Before altering the interpretation of section 214, the Commission must consider the importance of consistency. Under the APA, "[u]nexplained inconsistency is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."[37] The Commission cannot merely flip its position due to the political affiliation of the Chairman or majority, particularly when the interpretation would harm consumers. Rather, "[a]gency decisions must reflect the basis on which it exercised its expert discretion."[38] PK *et al* again urge the Commission to maintain consistency, logic and reason by following its own precedent with regards to interpreting the term "service."

[36] *Id*. at 548 (Breyer, J., dissenting).
[37] *Nat'l Cable & Telecomms. Ass'n. V. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).
[38] *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962). *see also Humphrey's Executor v. United States*, 295 U.S. 602,624 (1935) ([independent agencies] "exercise… trained judgment…. informed by experience").

III. THE DRAFT ORDER'S REVERSAL OF SECTION 214 RULES IN A DECLARATORY RULING IS A VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT.

A. The Commission Went Out of its Way to Avoid Public Comment Before Altering Section 214 Rules.

The Commission has gone out of its way to obscure the nature of this debate and avoid public comment by proposing to reinterpret the definition of service through a Request for Comment that fails to consider the procedural history of the functional test and the subsequent copper retirement and service discontinuance rules.[39] Over the course of several proceedings, the Commission has intertwined the use of the functional test with rules on copper retirement and service discontinuance. The Commission first clarified the use of the functional test in 2014 through a Declaratory Ruling that accompanied a Notice of Proposed Rulemaking.[40] Here, the Commission specifically clarified that a carrier's service to the public is defined in a functional manner while simultaneously seeking comment on criteria to evaluate discontinuance applications.[41] The Commission then affirmed the use of the functional test in 2015 through an *Order on Reconsideration* that was adopted alongside a *Report and Order and Further Notice of*

[39] *See* 2017 NPRM para. 3302.
[40] *Ensuring Consumer Premises Equipment Backup Power for Continuity of Communications Power for Continuity of Communications*, Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd 14968, 15015 para. 114 (2014) ("2014 NPRM").
[41] *See id.* at para. 5.

Proposed Rulemaking.[42] In the 2015 item, the Commission stated that having affirmed the functional test "it is prudent to provide additional guidance so that consumers and providers are clear on the meaning of the section 214 standard."[43] Finally, in its *2016 Second Report and Order*, the Commission adopted quality standards that carriers must meet when they seek to discontinue their legacy network and replace it with an alternative service.[44]

The Commission's Request for Comment and subsequent Declaratory Ruling in the Draft Order ignores this procedural history by proposing to eliminate the functional test without considering what impact this would have on the rules it adopted in its *2016 Second Report and Order*. Indeed, the request for comment sought comment exclusively on the Commission's Declaratory Ruling from 2014 and subsequent Order on Reconsideration affirming the functional test.[45] In doing so, the Request for Comment is similar to a Notice of Inquiry where the Commission is simply gathering information about the scope of section 214. Because the Commission relied on the functional test to adopt section 214 rules on quality standards in the *2016 Second Report and Order*, a Request for Comment and a subsequent Declaratory Ruling is not the proper mechanism to eliminate the functional test. Instead, the Commission should have

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[42] *See generally Technology Transitions et al*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 30 FCC Rcd 9372 (2015) ("*2015 Report and Order*").
[43] *Id.* at para. 7 ("Having established that section 214 discontinuance provisions apply to a service based on a totality-of-the-circumstances functional evaluation, we believe it is prudent to provide additional guidance so that consumers and providers are clear on the meaning of the section 214 standard.").
[44] *See 2016 Second Report and Order*, 31 FCC Rcd at paras. 88-194.
[45] *See* 2017 NPRM, 32 FCC Rcd at para. 115 ("We seek comment on whether we should revisit, and ultimately the proper scope of, the Commission's 2014 Declaratory Ruling and subsequent 2015 Order on Reconsideration expanding what constitutes a "service" for purposes of Section 214(a) discontinuance review").

initiated a Notice of Proposed Rulemaking where it could seek public comment on how removing the functional test would impact rules the Commission adopted in 2016.

B. Even If the Commission Adopts a Narrow Definition of the Term "Service," Section 214 Rules Will Remain Unchanged Until the Commission Holds a Notice and Comment Period to Consider If the Rules Are Still Appropriate Under the New Service Definition of Service.

The relevant section of the Telecommunications Act reads:

> "No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section."[46]

The Commission has historically interpreted this statutory mandate as broad authority to safeguard consumers against harmful practices by carriers. In the Commission's initial *2015 Report and Order*, it "reiterate[d] that [its] intent is to fulfill our statutory duty to safeguard the public interest while also facilitating technology transitions."[47] In 2016, the Commission explicitly stated it "has broad flexibility to administer the section 214 process in a manner that serves the public interest."[48] Further, the Commission specified that "[u]nless the Commission

[46] 47 U.S.C. §214(a).
[47] *2015 Report and Order* at para. 105.
[48] *In 2016 Second Report and Order*, 31 FCC Rcd at para. 51.

has the ability to determine whether a discontinuance of service is in the public interest, it *cannot protect customers* from having essential services cut off without adequate warning, or ensure that these customers have other viable alternatives."[49]

Even with a narrow definition of service as proposed, the Commission's statutory mandate to protect the public interest remains. The very purpose behind the creation of section 214 requirements was to ensure communities and everyday Americans were not harmed by carriers who often make business decisions without regard to how their customers' lives will be affected. Section 214 requires carriers to promptly notify and to follow the functional test because "the public interest demands that [the Commission] define more specifically what carriers' obligations are when discontinuing… services as part of a technology transition."[50] Replacing the functional test with the tariff test ignores the Commission's responsibility to act as a middleman between consumers and carriers and protect the public interest, as mandated by statute.

As an Independent Agency, the Commission must comply with the APA.[51] Specifically, the APA grants the Court power to set aside an agency action that is "arbitrary" or "capricious."[52] Under this standard, the Court has directed agencies to "consider all relevant data

[49] *Id*. at para. 103 (emphasis added) (quoting Business Options, Inc., EB Docket No. 03-58, Order to Show Cause and Notice of Opportunity for Hearing, 18 FCC Rcd 6881, 6892, para. 29 (2003).
[50] *2016 Second Report and Order*, 31 FCC Rcd at para. 62 (quoting *Emerging Wireline Order and Further Notice*, 30 FCC Rcd at 9481, para. 204)).
[51] 60 Stat. 237.
[52] 5 U.S.C. §706(A).

and articulate a satisfactory explanation for its action."[53] The Court, however, has limited its power and does not permit judicial review to "substitute its judgment for that of the agency [and] should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[54]

The APA also applies when an agency changes or shifts a previous policy position. The APA requires that the agency reasonably explain their new policy position, but does not need to show that the new policy is *better* than the old policy.[55] Agencies like the FCC are "free to change their existing policies as long as they provide a reasoned explanation for the change."[56] The agency must show "that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better"[57] as adequately indicated by the consensus change. Inherently, these three standards require the agency to acknowledge its change in policy[58] but does not always require the agency to give a more detailed explanation than would be required for a blank slate policy. The Court has held, however, that a more detailed explanation is required when the agency's "new policy rests upon factual findings that

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[53] *Motor Vehicles Mffn. Assn. of United States Inc. v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29, 43 (1983).
[54] *Bowman Trasnsp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974).
[55] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, (2009) ("*Fox*").
[56] *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981-982 (2005); *Chevron*, *USA., Inc. v. NRDC, Inc.*, 467 U.S. 837, 863-864 (1984).
[57] *Fox*, 556 U.S. at 515.
[58] *Id*. ("An agency may not, for example, depart from a prior policy *sub silencio* or simply disregard rules that are still on the books.") (quoting *United States v. Nixon*, 418 U.S. 683, 696 (1974)). *see also Fox* at 515 ("But the agency must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy").

contradict those which underlay its prior policy or when its prior policy has engendered *reliance interests* that must be taken into account."[59]

The Commission's *2015 Report and Order* and *2016 Second Report and Order*, which adopted the functional test, engendered serious reliance interests and therefore triggers a higher standard of review for the service definition changes made in the Commission's Draft Order. By requiring carriers to notify the Commission when a service was to be terminated, impaired or decreased, the Commission created a reliance interest for consumers. Consumers rely, whether or not consciously, on this notification requirement for stable alerts about their services. Further, several states such as Illinois have eliminated laws on copper retirement and service discontinuance.[60] Without state laws, consumers rely even more on the FCC to act as a cop on the beat to ensure they receive adequate substitute services when carriers seek to discontinue their copper networks.

Though the Commission's changes through an additional proceeding may be valid under the basic APA standard of review, the Draft Order changes are a violation of the APA under a heightened standard of review triggered by reliance interests. The Draft Order has not thoroughly explained why it is making a sudden change in defining "service" after years of interpreting the term to protect consumers.[61] The Draft Order has also not provided any factual information to

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[59] *Fox*, 556 U.S. at 515. *see also Smiley v. Citibank (South Dakota)*, 517 U.S. 735, 742 (1996) (emphasis added).

[60] Robert Channick, Illinois OKs end of landlines, but FCC approval required, Chicago Tribune (July 6, 2017), *available at* http://www.chicagotribune.com/business/ct-att-landline-end-illinois-0706-biz-20170705-story.html.

[61] *See generally Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, DRAFT Report and Order, Declaratory Ruling, and Further Notice of

show how or why the new definition of "service" is *better* than the existing definition.[62] The Draft Order does acknowledge that its changes would be a reversal of previous agency policy;[63] however, it does not give any further explanation on how this change would be *better* than the previous interpretation nor how it will fulfill its statutory mandate.[64] Instead the Draft Order makes sweeping and blanket proposals for the reinterpretation of section 214, such as if it would be "appropriate for the Commission to conclude that section 214(a) discontinuances will not adversely affect the present or future public convenience and necessity, provided that fiber, IP-based, or wireless services are available to the affected community," without supporting these proposals with data or analysis on how this new policy would not adversely affect consumers.[65] In fact, the only data or analysis the Draft Order offers for its changes are cites to carrier's comments in the record.[66] The Commission cannot reverse a policy position, particularly one that will now benefit carriers, with only industry backed support; reliance interests of American consumers cannot be jeopardized simply because the Commission trusts what carriers' lawyers argue. Under a heightened reliance interest standard of review, the Commission is required to base their policy shift on factual information more concrete than what is offered in the Draft Order.

Proposed Rulemaking, FCC-CIRC1711-04 (Oct. 26, 2017) *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-347451A1.pdf ("Draft Order").

[62] Draft Order at para. 127 (asserting only that a carrier's description in it its tariff is dispositive of what comprises a service under section 214(a)).

[63] *Id.* at para. 136-139; 2017 NPRM at para. 90-92.

[64] Draft Order at para. 127-141.

[65] *Id*. at para. 95.

[66] *See generally* Draft Order at para. 147-152.

IV. CONCLUSION

PK *et al*. have always supported the transition to next-generation network technologies and our belief remains strong that this transition can bring real benefits to everyday Americans. We do not, however, support the Commission's sudden shift in policy, especially without proper explanation and justification. For these, and all of the foregoing reasons, we strongly urge the Commission to maintain the functional test, fulfill its statutory mandate to protect the public interest, and fully comply with the APA.

Respectfully Submitted,

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